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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH ESCANDON,

Defendant and Appellant.

F042616

(Super. Ct. No. 02CM2386)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

Brian McNamara, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and Ruth M. Saavedra, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Gomes, J., and Dawson, J.

Appellant Ralph Escandon was found guilty after a jury trial of transportation of a controlled substance (Health & Saf. Code, § 11379, count one), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count two), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count three), and driving under the influence of a controlled substance (Veh. Code, § 23152, count four). The jury found true an enhancement alleging that Escandon was personally armed with a firearm (Pen. Code, § 12022, subd. (c)).

The trial court sentenced Escandon to prison for the low term of two years on count one plus three years for the firearm enhancement for a total prison term of five years. The court imposed a concurrent one-year term on count three, a misdemeanor, and stayed sentence on counts two and four pursuant to Penal Code section 654. The court imposed a restitution fine and granted Escandon applicable custody credits. On appeal, Escandon contends there was insufficient evidence at trial that he was armed with a firearm and that the jury's finding with regard to that enhancement must be reversed.

FACTS

At 1:00 a.m. on October 3, 2001, police stopped Escandon as he was driving a white Camero convertible for straddling the broken, white lines separating two traffic lanes. Escandon appeared to be under the influence of a controlled substance and failed a field sobriety test. Escandon was arrested, handcuffed, and placed in a patrol car. A passenger in the car with Escandon who did not appear to be under the influence of a drug was allowed to leave.

During a search of the Camero, an officer found a .45-caliber Lama automatic handgun in a holster which was secreted in a fold on the driver's side of the retracted convertible top. The gun magazine was empty. Another officer, however, found a second gun magazine loaded with seven bullets in the center console next to the driver's seat. The bullets fit into the gun retrieved from the car.

When Escandon was searched at the police station, officers found a brown plastic baggy underneath his toes. The baggy contained 1.44 grams of methamphetamine. A urine sample showed Escandon was under the influence of methamphetamine.

Escandon's sister testified that she owned the Camero. She did not learn there was a gun in the car until December 2001. Escandon told her the gun belonged to their cousin. Escandon also said he wanted to return the gun to their cousin.

DISCUSSION

Escandon contends there was insufficient evidence as a matter of law that he was personally armed with a firearm because the handgun was not loaded with ammunition and the gun itself was not readily accessible to him.

Being personally armed within the meaning of Penal Code section 12022, subdivision (a) does not require that the defendant carry the firearm on his person. Being personally armed distinguishes the defendant's conduct from one who is vicariously liable. (*People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, 1470-1471.)

Being armed with a firearm means that the gun is available for offensive or defensive use. This includes, for instance, an unloaded firearm sitting on the front floorboard of a car. (*People v. Mendival* (1992) 2 Cal.App.4th 562, 567, 574.) Firearms found hanging in a holster from a bedpost and found inside the drawer of a portable closet in a bedroom have been found to be available for use. (*People v. Wandick* (1991) 227 Cal.App.3d 918, 921, 927-928.)

The California Supreme Court has set forth facts which are reasonable to infer, as proof of arming with a firearm, when evidence at trial shows that a firearm is found in close proximity to illegal drugs in a place frequented by the defendant. From these initial facts, the jury may infer (1) the defendant knew of the firearm's presence, (2) the presence of the firearm with drugs is not accidental or coincidental, and (3) that at some time during the illegal drug possession, the defendant was present with both the drugs and the firearm and the firearm was available for the defendant to put to immediate use to

aid in the drug possession. If not refuted by the defense evidence, these inferences are sufficient to warrant a determination that the defendant was armed with a firearm in the commission of a felony within the meaning of Penal Code section 12022. (*People v. Bland* (1995) 10 Cal.4th 991, 1002-1003.)

The gist of Escandon's argument is that the gun was not available for use because it was stored within a fold of the convertible top and was not loaded with ammunition. Escandon contends there is no evidence the gun was available for his immediate use. *People v. Balbuena* (1992) 11 Cal.App.4th 1136 applied such reasoning and was expressly disapproved by the California Supreme Court in *Bland*. (*People v. Bland*, *supra*, 10 Cal.4th at p. 1001, fn. 4.)

The gun at issue here was stored inside the fold of the convertible top of the car. It was stored on the driver's side of the car. A clip of ammunition that fit the gun and could be fired from the gun was found in the center console between the driver's and passenger's front seats. This was evidence from which the jury could reasonably infer that the gun was available to and personally used by Escandon to assist him in the possession of illegal narcotics. We find that any inferences that the jury had to draw from this evidence were well within the guidelines set forth by our Supreme Court in *Bland* and that there was sufficient evidence adduced at trial to sustain the jury's finding that Escandon committed the Penal Code section 12022, subdivision (c) enhancement.

DISPOSITION

The judgment is affirmed.